July 26, 2006

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W. TW-A325
Washington, DC 20554

Attn: Jeremy Marcus, Acting Chief
Telecommunications Access Policy Division
Wireline Competition Bureau

Re: Written *Ex Parte* Presentation
CC Docket Nos. 96-45 and 97-21
Request for Review by Cingular Wireless LLC of Decisions of Universal Service Administrator

Dear Ms. Dortch:

On March 31, 2006, Cingular Wireless LLC ("Cingular") timely submitted a request for review of the outcome of an audit performed by the Universal Service Administrative Company ("USAC") of Cingular's reported end-user interstate and international end-user telecommunications revenues for calendar year 2001.[1] As demonstrated in the USAC Appeal, USAC's decision reflected an improper interpretation of the Federal Communications Commission's revenue reporting rules, which resulted in an inflated USAC estimate of Cingular's interstate end-user telecommunications revenues.

The USAC Appeal remains pending, and in the intervening period the Commission released a Report and Order modifying the CMRS Safe Harbor percentage and apparently addressing the definition of "toll revenues" in a certain wireless context.[2] In light of the *2006 Contribution Order*, as well as other recent Commission and D.C. Circuit decisions, Cingular hereby supplements its request for review to address these developments.

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[1] Cingular Wireless, LLC, *Request for Review of Decisions of Universal Service Administrator,* in CC Docket Nos. 96-45 and 97-21 (filed Mar. 31, 2006) (the "USAC Appeal").

[2] *See Universal Service Contribution Methodology, et al.*, WC Docket No. 06-122 *et al.*, Report and Order and Notice of Proposed Rulemaking, FCC 06-94 (rel. June 27, 2006) ("*2006 Contribution Order*").

I. The *2006 Contribution Order* Affirms the Continued Applicability of the CMRS Safe Harbor to *All* of a Wireless Carrier's End-User Telecommunications Revenues.

As a threshold matter, the *2006 Contribution Order* does not address the fundamental issue in Cingular's USAC Appeal: whether Cingular appropriately applied the CMRS Safe Harbor to its reported toll revenues for calendar year 2001. The Commission in the *2006 Contribution Order* requires those carriers that do "report actual interstate revenues" such as those using a traffic study, to properly report "itemized charges for toll service on wireless telephony customers' bills."[3] It does *not* require CMRS providers to report their actual interstate toll revenues – rather, it expresses concern that "wireless telephony providers who report actual interstate revenues may not be doing so accurately" with regard to toll revenues.[4]

By not requiring safe-harbor carriers to report actual interstate revenues (including toll revenues), the Commission in the *2006 Contribution Order* took a course consistent with that of the original *CMRS Safe Harbor Order*, which expressly recognized the challenges carriers face in identifying the origination and termination points of *any* mobile wireless call, toll or otherwise. As demonstrated in the USAC Appeal, the CMRS Safe Harbor is applicable to a mobile service provider's total telecommunications revenues irrespective of where any particular call terminates. Since it adopted the CMRS Safe Harbor in 1998, the Commission has modified the *level* of the factor but has not recanted its underlying rationale and applicability.

The Commission in the *CMRS Safe Harbor Order* "establish[ed] a safe harbor percentage of interstate revenues for cellular and broadband PCS providers of 15 percent of their *total* cellular and broadband PCS telecommunications revenues."[5] As discussed in the USAC Appeal, "[t]he Commission adopted the CMRS Safe Harbor in recognition of the difficulties inherent in distinguishing between interstate and intrastate traffic on mobile networks."[6] The Commission sought public comment on – but has never adopted – different methodologies and assumptions concerning mobile traffic to address technology-based limitations on the ability of CMRS providers to allocate wireless revenues between the interstate/international and intrastate nature of wireless traffic. Further, and as noted in the USAC Appeal, the DEM weighting data, which were the basis for the Commission's original 15 percent Safe Harbor figure, reflect both local *and* toll traffic. The same is true of the data underlying the 28.5 percent and 37.1 percent

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3 *2006 Contribution Order* at ¶¶ 29-32.

4 *Id.*

5 *See Federal-State Joint Board on Universal Service*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 13 F.C.C.R. 21252, 21258-59 ¶ 13 (1998) ("*CMRS Safe Harbor Order*").

6 USAC Appeal at 16-18.

figures adopted subsequently.[7] The Commission's rationale for the CMRS Safe Harbor thus supports interpretation of the plain meaning of the term "total cellular and broadband PCS telecommunications revenues" as including "total" telecommunications revenues derived from the provision of mobile service, *irrespective of whether the revenue might be classified under some definition as "toll."*

Even as the Commission's Form 499-A Instructions have changed over time, the Commission's and Bureau's rulemaking decisions since the original 1998 *CMRS Safe Harbor Order* have consistently confirmed that the CMRS Safe Harbor applies to *all* of a CMRS provider's end-user telecommunications revenues.

- In its 1999 Report and Order consolidating the Commission's various fund program reporting requirements, the Commission expressly declined requests to clarify or modify carriers' underlying USF contribution obligations – making only limited enumerated changes that did not include modifying the *CMRS Safe Harbor Order*.[8]

- In its 2001 *Safe Harbor Modification NPRM*, the Commission stated that "CMRS providers currently may report a fixed percentage of revenues ranging from one to fifteen percent *of total end-user telecommunications revenues*."[9]

- In its 2002 *Safe Harbor Modification Order*, the Commission confirmed that "[m]obile wireless providers availing themselves of the revised interim safe harbor will be required to report 28.5 percent *of their telecommunications revenues* as interstate".[10]

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[7] The 28.5 percent figure was based on traffic studies submitted by a number of wireless carriers through CTIA which do not appear to have excluded toll traffic. The 37.1 percent figure was based on a study of bill harvesting data that appears to have included all billed minutes.

[8] *1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, Report and Order, 14 F.C.C.R. 16602, 16614-17 ¶¶ 23-28 (1999) ("*Consolidated Reporting Order*").

[9] *See Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans With Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability*, Notice of Proposed Rulemaking, 16 F.C.C.R. 9892, 9899-9900 ¶ 12 (2001) ("*Safe Harbor Modification NPRM*") (emphasis added).

[10] *See Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in-Billing and Billing Format*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 F.C.C.R. 24952, 24966 ¶ 24 (2002) ("*Safe Harbor*

- In its 2003 *Reconsideration Order*, the Commission again confirmed that "[f]or wireless telecommunications providers that avail themselves of the interim safe harbors, the interstate telecommunications portion of the bill would equal the relevant safe harbor percentage times *the total amount of telecommunications charges on the bill.*"[11]

- In 2005, the Bureau described the CMRS Safe Harbor percentage (which had increased from the original 15% to 28.5%) as "permit[ting] those utilizing the safe harbor procedure to report as interstate, for contribution purposes, [a higher] 28.5 percent *of their total end user telecommunications revenues* ...."[12]

- In the most recent *2006 Contribution Order*, the Commission increased the safe harbor percentage further, but again stated that "mobile wireless providers that choose to use the revised interim safe harbor must report 37.1 percent *of their telecommunications revenues* as interstate ...."[13] Further, the basis for the increased percentage threshold was an interstate calling ratio attributed to Verizon Wireless in a TNS Telecoms analysis which appears to have included *all* wireless minutes, including "toll."[14]

Thus, the Commission's original determination in the *CMRS Safe Harbor Order* to apply the Safe Harbor to all of a CMRS provider's end-user telecommunications revenues remains in effect today. Commission decisions in rulemaking proceedings are rules for purposes of the Administrative Procedure Act,[15] and it is well established that an agency must abide by its own rules.[16] Accordingly, Cingular was entitled to apply the Safe Harbor in allocating its 2001 toll revenues.

Modification Order" (emphasis added)), *recon.* Order and Order on Reconsideration, 18 F.C.C.R. 1421 (2003) ("*Safe Harbor Modification Recon Order*").

11 *See Safe Harbor Modification Recon Order* at ¶ 51 n.131(emphasis added).

12 *See Federal-State Joint Board on Universal Service, Access Charge Reform, Petition for Reconsideration and Clarification of the Fifth Circuit Remand Order of BellSouth Corporation*, Order, 20 F.C.C.R. 13779, 13782 ¶ 8 (WCB 2005) (emphasis added).

13 *2006 Contribution Order* at ¶ 27 (emphasis added).

14 *Id.* at ¶ 25 and nn. 95-97.

15 The Administrative Procedure Act ("APA") defines "rule" to mean "the whole or a part of an agency statement of general or particular applicability and future effect." 5 U.S.C. § 551(4); *see also Public Citizen, Inc. v. United States Nuclear Regulatory Commission,* 940 F.2d 679, 681-82 (D.C. Cir. 1991).

16 *See, e.g., McElroy Electronics Corp. v. FCC*, 86 F.3d 248, 253 (D.C. Cir. 1996); *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986).

II. Commission Repudiation of Its Rulemaking Decisions in Favor of the Form 499-A Instructions May Not Be Imposed Retroactively

Since 2000 the Form 499-A instructions have provided that "revenues associated with" the Mobile Services category should include mobile services revenue but exclude toll revenues, but the Instructions did not preclude use of the CMRS Safe Harbor as a "good faith estimate" to allocate revenues reported in the toll category. In 2002, the following language was added to the instructions:

> These safe harbor percentages may not be applied to ... toll service charges. All filers must report the actual amount of interstate and international revenues for these services. For example, toll charges for itemized calls appearing on mobile telephone customer bills should be reported as intrastate, interstate or international based on the origination and termination points of the calls.[17]

USAC seeks to enforce this restrictive language with respect to Cingular's 2001 reported revenues.

In its USAC Appeal, Cingular demonstrated that it would be unlawful to impose the policy set forth in the current Form 499-A Instructions retroactively [18] (setting aside the question of whether the 2002 and later Instructions were even consistent with the Commission's later rulemaking decisions[19]). Recent Commission and D.C. Circuit decisions are consistent with this conclusion. The D.C. Circuit recently confirmed that "'judicial hackles' are raised when 'an agency alters an established rule defining permissible conduct which has been generally recognized and relied on throughout the industry it regulates'" and that retroactivity is not appropriate where an agency "substitut[es] ... new law for old law that was reasonably clear ...."[20] As the Commission's rulemaking decisions are "reasonably clear" (indeed, *explicitly* clear) that the Safe Harbor applies to *all* of a CMRS provider's end-user telecommunications revenues, retroactively applying any repudiation of those Commission rulemaking decisions in favor of the inconsistent Instructions is inappropriate for any time prior to when any such repudiation occurs.[21]

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17 This language was included as an Appendix to the *Safe Harbor Modification Order*, but at the time had not received OMB approval and was merely "attached for informational purposes." The revised Form was not approved until March of 2003. *See* 68 Fed. Reg. 12353 (Mar. 14, 2003). Further, while Section 54.711(a) expressly requires that the Form 499-A be published in the Federal Register, the Commission has never complied with this requirement.

18 *See* USAC Appeal at 30-32.

19 *See supra* Section I.

20 *See AT&T Co. v. FCC*, No. 05-1096, Slip Op. at 5 (D.C. Cir. July 14, 2006) (*citing NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966), and *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001)).

21 *See id.*, Slip Op. at 5; *Verizon Tel. Cos. v. FCC*, 269 F.3d at 1109 (where "there is a 'substitution of new law for old law that was reasonably clear,' a decision to deny retroactive effect is uncontroversial," quoting *Williams Nat. Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 2001)).

Even giving the Commission the benefit of the doubt and not reading the Commission's clear pronouncements as dispositive, the Form 499-A Instructions created an incomprehensible morass that has still not been addressed even in the Commission's most recent decision.[22] If anything, the *2006 Contribution Order* appears to confirm that the Safe Harbor applies to *all* of a wireless carrier's telecommunications revenues. The fact that the rules cross-reference the Form 499-A's information requirements does not change the analysis.[23] In these circumstances, the Commission's retroactive repudiation of its repeated pronouncements would be impermissibly unfair given CMRS providers' reasonable reliance through the present on the clear language of the Commission's rulemaking decisions.[24] Over the years, Cingular has paid hundreds of millions of dollars in USF contributions in reliance on the Commission's clear pronouncements. Should the Commission repudiate these rulemaking decisions and retroactively impose additional contribution obligations for earlier years, Cingular would be restricted in its ability to recover the costs of those contributions from its subscribers.[25] As the D.C. Circuit has explained, "the longer and more consistently an agency has followed one view of the law, the more likely it is that private parties have reasonably relied to their detriment on that view."[26] Thus, viewed most favorably for the Commission, the incremental changes to the Form 499-A over the years in a manner that is flatly inconsistent with the Commission's own statements have rendered its rule so hopelessly muddled that applying

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[22] In the *Prepaid Calling Cards* decision, the Commission found that its findings with respect to menu-driven cards were consistent with the conclusions of a previous Order and NPRM, yet declined to apply the rule retroactively because of concern that doing so "would be so unfair ... as to work a 'manifest injustice.'" *See Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Declaratory Ruling and Report and Order, FCC 06-79, ¶ 45 (rel. June 30, 2006) ("*Prepaid Calling Cards*"). Here, in contrast, numerous Commission rulemaking decisions have explicitly stated that the Safe Harbor applies to all of a CMRS provider's end-user telecommunications revenues. The Commission in the *Prepaid Calling Cards* decision also found that the NPRM seeking comment on the appropriate treatment of enhanced calling cards contributed in part to the lack of clarity there. *Id.* In contrast, the still-pending FNPRM on the Safe Harbor underscores the clear statements of the Commission's rulemaking decisions, indicating that until such time as the Commission adopts such requirements, use of the Safe Harbor is permissible. *See CMRS Safe Harbor Order* at 21268-21271 ¶¶ 27-34, 21273-74 ¶ 38 (seeking comment on the very sort of "simplifying assumptions" necessary to determine the jurisdictional nature of a mobile wireless call).

[23] *See* 47 C.F.R. § 54.711(a). At best, this fact means that the Commission has simultaneously adopted and maintained directly contradictory rules. *See General Chem. Corp. v. United States*, 817 F.2d 844, 857 (D.C. Cir. 1987) (vacating and remanding agency action as "arbitrary and capricious" because it was "internally inconsistent and inadequately explained"); *cf. Schools and Libraries Universal Service Support Mechanism*, 19 F.C.CR. 15808, 15826-28 (where the Form instructions and rule were inconsistent, the Commission waived the requirements of the more stringent rule so that parties that had complied with the less stringent instructions were not found to be in violation of the rule). In contrast to the situation before the court in *AT&T v. FCC*, where the Commission provided notice that AT&T might require it to pay USF contributions based on calling card revenues via both a 1995 Order *and* the USF "contribution forms," the forms here are flatly inconsistent with numerous FCC rulemaking decisions since 1998. *See AT&T v. FCC*, Slip Op. at 8.

[24] This is in sharp contrast to the circumstances before the court in *AT&T v. FCC*, in which the petitioner's reliance on pre-1996 Act rules and "a mixed bag" of precedents did not preclude retroactive application of the Commission's decision. *See AT&T v. FCC*, Slip Op. at 6-7.

[25] *See* 47 C.F.R. § 54.712(a).

[26] *See Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1082-83 (D.C. Cir. 1987).

the Instructions' limitation to the CMRS Safe Harbor retroactively to any period prior to repudiation of such prior statements would be arbitrary and capricious.

III. CONCLUSION

In applying the CMRS Safe Harbor to its toll revenues Cingular has reasonably relied on numerous, recent, directly on-point, and unambiguous Commission rulemaking decisions. To the extent the Commission repudiates those prior pronouncements in favor of the inconsistent Instructions, it may do so prospectively only. The Commission should therefore grant Cingular's USAC Appeal and not impose the Form 499-A Instructions retroactively.

Please contact the undersigned if you have questions or need additional information.

Respectfully submitted,

/s/Ben G. Almond
Ben G. Almond

ec: Jeffrey Mitchell, USAC

CERTIFICATE OF SERVICE

I, Robert G. Morse, hereby certify that on the 26th day of July, 2006, I caused copies of the foregoing Written *Ex Parte* Presentation to be sent to the following by hand delivery:

Universal Service Administrative Company
2000 L Street, N.W.
Suite 200
Washington, D.C. 20036

/s/_____

Robert G. Morse